IN THE

United States Circuit Court of Appeals

FOR THE NINTH JUDICIAL CIRCUIT

THE EBNER GOLD MINING COMPANY, a corporation, *Plaintiff in Error,*	
vs.	No. 2155.
ALASKA JUNEAU GOLD MINING COMPANY, a corporation, *Defendant in Error.*	

Reply Brief of Plaintiff in Error

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REPLY BRIEF OF PLAINTIFF IN ERROR.

Counsel for the defendant in error on page 3 of his brief, under the heading "Assignment of Error," states among other things as follows:

"In other words, it is not contended that there was *no* evidence in support of the findings made by the court, but it is contended that in the presence of a conflict the court should have found the facts as claimed by plaintiff."

It will appear evident to this Honorable Court that counsel for defendant in error is mistaken in the above assertion. He would only have had to read over our brief to have ascertained his mistake. We have stated both in oral argument and in our brief over and over again that there was *no* evidence to support the material findings of fact which the trial court made against the plaintiff—we have cited

authorities to show obvious error by the trial court in the application of the law and *serious* or *important* mistakes made by the trial court in the consideration of the evidence produced upon the trial—and for these reasons contend that instead of the doctrine that is laid down in the case of *Thorndyke vs. Alaska Perseverance Mining Company,* 164 Federal, 657-655, being against our contention in the present case, that it is in our favor. The court there states substantially to the effect that findings are always to be taken as presumptively correct; unless an obvious error has intervened in the application of the law or some *serious* or *important* mistake has been made in consideration of the evidence, the findings should not be disturbed. We submit that in this case it clearly appears that *serious* and *important mistakes* have been made and think that we will have successfully shown this to this Honorable Court after filing this reply brief.

We will in this reply refer to the plaintiff in error as plaintiff, and the defendant in error as defendant, and proceed to reply to defendant's brief in the following order:

First—Discovery.
Second—Annual Labor.
Third—Possession.

I.

DISCOVERY.

Judge Hunt, one of the Circuit Judges constituting the Appellate Court at the time the oral argument was made in this case, asked our Mr. Winn substantially, why it was that the lower court found against the plaintiff on the question of *discovery?* For fear that this interrogatory was not clearly answered upon oral argument we think we can demonstrate to this Honorable Court to a mathematical certainty why and how it was that the trial court found against the plaintiff, as to its discovery upon the Parrish No. 2 Mining Claim. At the very outstart of the answer brief of the defendant the following statement on page 6 in relation to discovery on the Parrish No. 2 claim is made, "At no time during the trial did plaintiff seriously urge that a discovery had been made by the locater of the Parrish No. 2 at any other point than the cut at Borean Pit." It will also clearly appear from the record that it was the contention of counsel who represented the defendant upon the trial of the case in the lower court that that court could not consider any other discovery except the one made at the Borean Pit, and the court must cer-

tainly have followed this theory because we are unable to account for the finding of the trial court on any other hypothesis or theory. In other words, the court ignored the *undisputed evidence as to any subsequent discoveries* made by Mr. Ebner upon the mining claim in question. It is also very evident from the answer brief of the defendant that Judge Lindley has ignored in his argument the other discoveries made by Ebner, and has endeavored to base his case upon the question of there being a conflict in the evidence pertaining to the discovery made at the *Borean Pit,* and upon this ground attempts to justify the finding of the trial court with respect to there being *no sufficient* discovery. To further prove our contention in this respect, that is both the trial court and counsel for the defendant have considered the case in respect to discovery solely in the light of the discovery at Borean Pit, we call this Honorable Court's attention to the carefully selected portions of Ebner, Kenzie, Stewart and Whalen's testimony, contained on pages from 6 to 12 inclusive of defendant's brief. All of this testimony so cited refers to the Borean Pit and the discovery made at that place and to that discovery alone. Of course, counsel for the defendant argued that Kenzie's testimony regard-

ing certain slides was sufficient to contradict any and all evidence introduced by the plaintiff pertaining to any and all discoveries, but we think if this Honorable Court will read over the portion of Mr. Kenzie's testimony above referred to in connection with his testimony that we have quoted and had printed in our first brief, it will come to the conclusion that no such construction can be placed upon Mr. Kenzie's testimony taken as a whole or in part, but on the other hand it corroborates our proof of other discoveries on Parrish No. 2.

The reading of those portions of the testimony of the witnesses Stewart and Whalen, referred to by the defendant, will immediately convince anyone that these two witnesses so far as the quoted testimony is concerned, refer only to the discovery claimed to have been made at the Borean Pit.

In connection with Kenzie's testimony we invite this court's attention to the excerpts printed in our brief in chief on pages 61-66 inclusive, and while reading the same bear in mind that it is a conceded fact in this case that the Oregon and Canyon Lode claims, under which locations the defendant was claiming the ground in controversy, covers practically the same surface ground as the Parrish No. 2. (See Defendant's Brief, page 2.)

Kenzie, who is agent and superintendent of the defendant, states in effect that in 1899 (at the time Corbus located the Oregon) he went up Gold Creek, on which creek the Oregon Lode claim was located, as far as he could go up said creek, and up the hill on the Oregon claim. That he went over the ground and determined as far as he could by looking at it the general line that the mineral zone passed through and found mineralized shist and quartz in place; that he did not make any assay of it, but thought it was mineral bearing or gold bearing rock. Then in testifying in relation to the discovery made on the Oregon claim, as located by Corbus and as located by Datson, marked on defendant's Exhibit 7 (P. R. p. 1722), the letter "A" as the point of discovery, and on being questioned as to where the rock in place was found by him when he went over the Oregon claim referred to the exhibit in question and the point at letter "A" and stated that to the best of his recollection it was both on the south side, the north side, and all around said point; and the witness goes on and explains how the formation or the mineral bearing rock is crossed-cut and shown up by Snow Slide Gulch and Gold Creek; also testifies as to the discovery that was made on the Canyon Lode claim, and stated in his judgment that that discovery was on the Parrish No. 2. All of this evi-

dence concerning discoveries on the Oregon, which claim covers practically the same ground as the Parrish No. 2, is corroborative of the discoveries which Ebner testified he made upon the latter claim.

From pages 67 to 69, inclusive, we have in our brief in chief excerpts taken from the testimony of the witness W. R. Lindsay, a witness on behalf of the defendant, a mining engineer and the locater of the Canyon Lode claim. This witness in effect states that he made the discovery on the Canyon Lode claim and that the discovery was very near the common sideline of the Parrish No. 2 and the Lotta Lode claims, and that there was no trouble in finding rock in place anywhere on Gold Creek from where he made the discovery for six or seven hundred feet on either side, meaning both up and down the creek, and that by rock in place he meant mineralized rock carrying values, as he had assayed it. This testimony also corroborates the testimony of our witness Ebner in the discovery which he claims he made on his lode line, where it intersected Gold Creek, for the reason this discovery point on the Canyon claim is conceded to be at least within fifty feet of defendant's dam, which said dam is on the common sideline of the Lotta and Parrish No. 2 claims.

We here call the court's attention to that portion of Mr. Ebner's testimony contained in our first brief on pages 45 to 59, inclusive. On page 48 he states that he discovered quartz in place carrying gold values near the southeast center stake of the Parrish Lode claim, and this is the discovery that is referred to as at the Borean Pit. On the same page he states that where the center or lode line crossed the creek about four or five hundred feet from the Borean Pit discovery and near the center of the Parrish No 2, he found rock in place carrying value. (The words "old line" as printed in the brief should be "lode line," as the reading of Mr. Ebner's evidence will clearly show that the stenographer has made a mistake and instead of using the word "lode" has used the word "old.") Then he claims that he had the rock in place assayed and that the general value of the ore all up and down the creek (meaning Gold Creek) is from $1.50 to $3.50 per ton. Witness further states on cross examination by defendant's counsel which is shown at page 51 of our brief in chief, when the question was propounded to him, "Where else?" (meaning "Where else did you find the discovery?" states substantially that at another point down the creek where he had started a tunnel, and up on the bank

where he had piled quartz and where he had made a large open cut that he had found good pay rock in place, and on page 52 states that he had taken an average sample and that it would assay. The witness continues to positively locate this discovery on his cross examination. On page 54 he points out on one of the exhibits another place where he had made a discovery of mineral bearing rock in place on the Parrish No. 2, and states that it was near the Lotta line and almost opposite a certain cabin which he pointed out on one of the exhibits. On page 55 he states another discovery made on the Parrish. The witness further tells that in 1903 he continued to cross-cut and dig ditches and thoroughly prospected the ground, and that he stripped down to bedrock and took assays to ascertain where the values were, and that he found that there were values, and in that year he built the blacksmith shop and started to run the tunnel on the Parrish No. 2, which is shown in some of the photographs to be down near the creek bed. In our first brief we called the court's attention to all these discoveries and to this testimony of Mr. Ebner, and challenged and defied counsel for the defendant to cite any evidence of testimony from the record in this case that would in any manner contradict Mr. Ebner's testimony concerning any and all of these discoveries,

except the one made at the Borean Pit, and counsel for the defendant has utterly failed in our opinion to do so, and has thus conceded that there is no contradictory evidence in the entire record pertaining to any discovery, except the one at the Borean Pit. Ebner's testimony about the other discoveries is absolutely uncontradicted and in many respects has been even corroborated by the officers and agents of the defendant company. The court will also bear in mind that all of these discoveries were made prior to any claim whatsoever made by the defendant company or any of its grantors to any of the surface ground of the Parrish No. 2 Lode claim, or to any water or water rights on Gold Creek, and in view of this evidence, uncontradicted as it is, and supplemented by the fact that both plaintiff and defendant are claiming the same surface ground and the same lode, under their respective mineral locations, and the further fact that the ground has been classified by the Government as mineral ground—with all due deference to the finding made by the lower court that "no sufficient discovery" had been made upon Parrish No. 2 claim, it would in our opinion be absolutely unjust to permit a judgment to stand based upon such finding.

> "Whether there is any evidence in support of a finding is a question of law, and if the

finding is unsupported by evidence, or if a fact material to a finding upon which the judgment is based is unsupported by evidence, the judgment will be reversed."

3 *Cyc.* 362.

"A judgment against evidence, fairly amounting to proof without conflict, is not within the rule that the appellate court will not reverse on the mere weight of the testimony."

Fulmer vs. Packard, 5 Ind. App. 574, 32 N. E. 784.

II.

ANNUAL LABOR.

As to annual labor prior to the year 1909, being the year when the trial court held the annual assessment work was done, we have fully shown in our brief that each and every year from and including the year 1899 up to and including the year 1910, the year when this case was tried in the lower court, at least $100 was actually spent for work and labor done and performed upon the Parrish No. 2 Lode mining claim. We have asserted and here reiterate that there is no contradictory testimony to show that this expenditure was not in fact made. It appears from our brief by testimony fully corroborated and substantiated, that at least $100 was actually paid each and every year during the time

aforesaid to the men doing and performing the work; and further, the men so receiving the money for doing the work and labor prior to the year 1907, and including that year and subsequent years, testified to receiving the money for such work and labor which they had performed upon said Parrish No. 2 claim.

As contended in our brief *where the work is done directly upon the claim itself, it becomes immaterial whether such work and labor does in fact benefit the claim.*

See *Morrison Mining Rights*, 14 Ed. 120;
Wailes vs. Davies, 158 Fed. 667;
Lindley on Mines, 2nd Ed., Sec. 629, p. 1162;
Morrison Mining Rights, 14 Ed. 117;
U. S. vs. Iron-Silver Co., 24 Fed. 568;
St. Louis Co. vs. Kemp, 104 U. S. 636.

We have particularly emphasized in our brief that *courts will not enforce a forfeiture except upon clear and convincing proof of the failure of the former owner to perform the amount of labor required by law.*

See *Loeser vs. Gardner et al.*, 1 Alaska Rep. 641;
Wulff vs. Manual, 23 Pac. 723;
Mattingly vs. Lewisohn, 35 Pac. 111;

Thomson et al. vs. Allen et al., 1 Alaska Rep. 636;

Prov. Gold Min. Co. vs. Burke, 57 Pac. 641;

Ames vs. Kruzner et al., 1 Alaska Rep. 598;

McCullouch vs. Murphy et al., 125 Fed. 147;

Whalen Consol. Cop. Min. Co. vs. Whalen et al., 127 Fed. 611;

Hammer vs. Garfield Min. etc. Co., 130 U. S. 291;

Lockhart vs. Johnson, 181 U. S. 516;

McKay vs. Neussler, 148 Fed. 87.

In view of the foregoing authorities, we would ask what evidence is there in this case to support the finding of the District Court that the necessary assessment work prior to the year 1909 had not been done and performed on the Parrish No. 2 Lode claim?

To support such a finding it would have to be conceded:

(1) That the fact of spending $100 each and every year, in good faith, in the performance of annual labor upon a mining claim, could at any time later be questioned, and if the improvements visible to the eye upon such claim did not total up the amount of money expended thereon, such claim could be declared forfeited;

(2) That notwithstanding forfeitures are odious in the law, every reasonable doubt would be resolved in favor of a forfeiture of a mining claim rather than to sustain the validity of such claim: and

(3) That instead of requiring clear and convincing proof of the failure of the owner to perform the amount of labor, upon the most meager testimony or without any testimony at all, a forfeiture could be declared.

As stated above, there is absolutely no testimony contradicting the evidence to the effect that $100 was actually paid each and every year since 1899 up to and including the year 1910 for annual assessment work done and performed directly upon the Parrish No. 2 mining claim, and we contend that in this case such proof fully protects the claim so far as annual assessment work is concerned, and to declare a forfeiture under such circumstances is in opposition to, and against the spirit of, the law.

III.

POSSESSION.

The defendant in error in its brief, however, gives extracts of the testimony of O. M. Harry to support the finding of the lower court that the

plaintiff in error was not and never had been seized, possessed or entitled to the possession of that certain tract of ground * * * known and referred to as the Parrish No. 2 Lode mining claim.

We take the liberty of giving a few extracts taken from the testimony of witnesses for the defendant in error, including extracts from O. M. Harry's testimony, which we thing clearly shows that the plaintiff in error was in the actual possession of its mining claims, including the Parrish No. 2 claim, at the time that it was ousted therefrom by the defendant in error.

The cabin referred to by O. M. Harry in the extract of his testimony quoted in brief of defendant in error was built upon the Cape Horn lode claim and not the Parrish No. 2. (See P. R. 923.)

It appears from the testimony of R. A. Kenzie on page 908 of the printed record that other than O. M. Harry, who built the cabin aforesaid, the first work done upon the ground embraced in the Parrish No. 2 claim by the defendant in error, was the commencement and the driving of a tunnel on September 10, 1910. On the next page this witness fixes the date as September 12.

It will be seen from the oral opinion of the trial court (P. R. 1711) in Cause No. 733 B, which was an action to restrain defendant, its agents, servants and employees from crossing over the Parrish No. 2 Lode mining claim, that suit was brought prior to September 2nd by plaintiff against the defendant to prevent defendant from crossing said Parrish No. 2 Lode mining claim with its flume line.

On page 433 of the printed record it appears that on August 25, 1910, in Cause No. 803-A, suit was filed by plaintiff to restrain and enjoin the defendant from going on the premises (Parrish No. 2 claim) and the oral opinion referred to in the preceding paragraph was the result of preliminary hearing in said Cause No. 803-A.

We also call the court's attention to these two last mentioned suits to show that we sought to restrain defendant in the first place from passing over plaintiff's property with the flume.

Al Black, a witness on the part of the plaintiff, testified as follows:

"Q. Now, where were Middleton and the people under Mackay working with reference to where the Treadwell people afterwards put in this dam—not the Treadwell but Mr. Kenzie's people?"

"A. There were other men working—there was Middleton and Graham and McKenna were working

down there on the tunnel on the Parrish No. 2 claim, working on the upper—above there—cutting out a line and brushing and cutting a trail."

"Q. Where were they working with respect to this line that you say you helped to brush out as was referred to as the lower line of the Lotta claim —above that line or this side of that line, that is up or down the creek with respect to that line?"

"A. They were working on the line and they were working above and below—both—right along."
(P. R. 434.)

"Q. Did you notice any of the people under Kenzie up there either on the Lotta or on the Parrish No. 2 Lode claims?"

"A. Well, they were there on the 26th (Sept.) and we ordered them off."

"Q. You have been talking about the 26th—you ordered them off on the 26th?"

"A. Yes."

"Q. What other time?"

"A. I don't know whether they came back the next day—they didn't come back the next and the next day I think it was they came back again."
(P. R. 435.)

"Q. On the 28th?"

"A. And we ordered them off and got them off again—I ain't sure whether it was the next day or the day after."

"Q. Was there any other time that they tried to make an entry again?"

"A. Well, they came in there on the first of October."

"Q. On the first of October?"

"A. On the first of October."

"Q. What did you do then?"

"A. We ordered them off again."

"Q. Was that Mr. Kenzie, Burch or Kennedy?"

"A. That was Kennedy and those Finlanders, I think it was."

(P. R. 434-5-6.)

From the above testimony it appears that on September 26, the plaintiff in error was in the actual possession by its servants and employees of the Parrish No. 2 Lode mining claim and were engaged in driving a tunnel on said claim. That on said 26th day of September, the servants and employees of the defendant in error were ordered to depart from said property, which they did; that on the 28th day of September, the servants and employees of the defendant in error again came upon said mining claim and were ordered to depart therefrom, which they did; that the servants and employees of defendant in error again entered upon said Parrish No. 2 Lode mining claim and were again ordered to depart therefrom. That during all

these times plaintiff in error was and remained in the actual possession of the said Parrish No. 2 Lode mining claim.

It appears from the testimony of Al Graham, a witness for plaintiff in error, on page 530 of the record, that he went to work in the tunnel on the Parrish No. 2 Lode claim on the 19th day of September, 1910, and that he worked there for twenty days, and that at the time of quitting work in said tunnel a man by the name of Mike McKenna, employed by the plaintiff in error, continued the work in said tunnel.

On pages 531 and 532 this same witness testifies that from the 19th day of September up to the day that Kennedy (assistant superintendent of the defendant in error) came there (on the Parrish No. 2 claim) the first and third of October, he and Mike McKenna were working in the tunnel on the Parrish No. 2 claim.

On page 533 of the printed record it appears from the testimony of this witness that he was still working in the tunnel on the Parrish No. 2 claim when Kenzie (superintendent of the defendant in error) and his men came in the vicinity of the Parrish No. 2 claim.

On page 534 this witness also states that Ed Seitz and John Carlson, employees of the plaintiff in error, were working on said Parrish No. 2 claim.

On page 560 of the record Mike McKenna, a witness on behalf of the plaintiff in error, states that he commenced work for the plaintiff in error on the 15th day of September, 1910, and that he continued to work thereon on the 16th day of October.

Fred M. Ridell, a witness on behalf of the plaintiff, states that on September 23rd or 24th a fence was put across the road leading to the Ebner air compressor and a notice posted thereon to keep people off. (P. R. 644-45.)

We submit that the evidence is uncontradicted that during all these times up to and including the 3rd day of October, 1910, upon which date the defendant, by resorting to the criminal arm of the court, had the employees of the plaintiff arrested, plaintiff was in the actual possession of its mining claims including the Parrish No. 2. It was only by keeping up and continuously arresting plaintiff's employees and taking them from their work that the defendant was enabled to get on the Parrish No. 2 claim and construct its flume line. (P. R. 491 to 496 and 601.)

As is shown above there was no actual work done upon the mining claim in question prior to September 10th, or 12th, either in grading or laying the flume line or driving tunnels by the defendant, and the only evidence of anything that was done by the defendant prior to that time upon the claim appears from the testimony of O. M. Harry, quoted in the brief of the defendant, which we submit is practically nil. The building of the cabin by Harry on another mining claim and his residing therein could not give the defendant possession of the Parrish No. 2 claim.

It appears also conclusively from the record that the only color of title, if indeed it can be called color of title, that defendant had at the time that it made forcible entry upon the premises in question, was the posting of a notice on the patented Lotta claim of the plaintiff near the old compressor house and the two location notices posted and perhaps recorded of the Canyon and Oregon lode claims. The water notice having been posted upon patented ground is as we contend void and without any force or effect whatsoever, and the defendant seemed to recognize this fact, for it afterward posted a second location notice of water on or at the point that it constructed its dam. (P. R. 1256 and 31 to 38, inclusive.)

The trial court held that the attempted locations of the Canyon and Oregon claims were void from the beginning. Hence in law and as a matter of fact we contend that the defendant and its agents and employees were at all times naked trespassers upon the Parrish No. 2 claim and the Lotta, without excuse and without color of title. Plaintiff was in possession, as we claim, under a good and valid location, having properly staked and marked the boundaries and posted and recorded its notice of said mining claim and according to the finding of the lower court had done the assessment work upon this claim for the two years just prior to the wrongful entry thereon by the defendant.

> "Plaintiff's right to possession, *or his possession* at the time of entry *by one under no better right or title*, is sufficient for the maintenance of the action."
>
> 27 *Cyc.* 641-42 b.

It will be borne in mind that the ouster of plaintiff in error by defendant in error was for the purpose—not that they were seeking to make a discovery within the exterior boundary lines of the Parrish No. 2 claim—but to construct a flume line thereover.

> "Possession of a mining claim, without reference to mining rules, is sufficient to main-

tain ejectment as against one entering by no better title. This possession need not be by actual inclosure, but if the ground was included within distinct, visible, and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries, it is enough, against one entering without title. The regular and usual way of obtaining possession of mining claims is according to the mining regulations of the vicinage, still, a possession not so taken is good against one taking possession the same way; and the actual prior possession of the first occupant would be better than the subsequent possession of the last. No acts are required as evidence of the possession of a mining claim, other than those usually exercised by the owners of such claims. A miner is not expected to reside on his claim, to build on it, to cultivate it, or to inclose it. He may be in possession by himself, or by his agents or servants. Going on the lode to work it, or even work done in proximity and in direct relation to the claim for the purpose of extracting or preparing to extract minerals from it, as for example, starting a tunnel a considerable distance off, to run into the claim, would be possession of the claim within the meaning of the rule. Where one enters under a written claim or color of title, his possession, except as against the true owner or prior occupant, is good to the extent of the whole limits described in the paper, although the possession be only of a part of the claim."

27 *Cyc.* 641-2, note 3.

In our first brief filed in this case we went into the question of the customs of miners in Harris Mining District quite thoroughly, and exten-

sively (pages 108 to 132, inclusive, of brief). We do not conceive of any point raised by the brief of the defendant in respect to the customs in question that has not already been covered by us as above stated. Hence it is unnecessary to burden this Honorable Court with any further argument or citation of cases upon this phase of the case.

We also in our first brief contend that under any circumstances or whatever turn the case may take in this Honorable Court, that we are entitled to the cost in the lower court and costs of the printing on the request of the defendant, of the additional record in this court. We have already pointed out to this Honorable Court just how much of the record we desired to have printed and the additional record which was printed as above stated at the request of the defendant.

In conclusion we respectfully insist that, as we submitted findings to the court below, that were the only findings that there was any evidence to support, that they should have been signed and judgment rendered thereon for plaintiff—in other words, we asked for judgment for plaintiff upon the entire proof submitted—hence the trial court should not only be reversed, but plaintiff should have judgment for the Parrish No. 2 mining claim

and all costs and disbursements in the lower court and for costs in this court.

Respectfully submitted,

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